No. 80-544

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the Board properly concluded that petitioner's refusal to bargain with the Union about petitioner's decision to close a portion of its operation and to discharge the employees in that portion of its operation violated Section 8(a)(5) and (1) of the National Labor Relations Act.

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Statutes: Page

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Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks* v. *NLRB*, 92 Harv. L. Rev. 768 (1979) 17, 20, 29
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Employee Protection and Community Stabilization Act of 1980: Hearings on S. 1609 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. (1980) 20, 24, 25
Greenberg, *Deviations From Wage-Fringe Standards*, 21 Indus. & Lab. Rel. Rev. 197 (1968) 21

Miscellaneous—Continued Page

Hearings on Plant Closing Problems: Hearings on H.R. 5040 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 2d Sess. (1980) 20, 24, 25
Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations*, 26 Indus. & Lab. Rel. Rev. 956 (1973) 21
Hershey, *Layoff Ahead: How Do Employees Respond?*, 49 Personnel 29 (Nov. 1972) 22
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How Cooper Tire Stays Healthy, N.Y. Times, Feb. 2, 1981 21
Now, It's Pay Cuts Instead of Raises, U.S. News & World Report, Feb. 9, 1981 21
'Out of Business': A Plant Shutdown is Always Painful, But it Need Not Be Merciless, Wall St. J., Feb. 28, 1972 22
Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803 (1971) 20-21
Ruben, *Industrial Relations in 1980 Influenced by Inflation and Recession*, 104 Monthly Lab. Rev. 15 (Jan. 1981) 21
S. 1609, 96th Cong., 1st Sess. (1979) 24
S. Rep. No. 573, 74th Cong., 1st Sess. (1935) 33
S. Slichter, J. Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* (1960) 21
A. Slote, *Termination: The Closing of Baker Plant* (1969) 22
Thompson, *How to Avoid People Problems in a Plant Relocation*, 67 Management Rev. 32 (Sept. 1978) 23
Wall St. J., Mar. 4, 1981 21
Wash. Post, Feb. 3, 1981 21
Watson, *A Sensible Approach to Mass Layoffs*, 3 Pub. Personnel Management 233 (1974) 23
E. Whitman & W. Schmidt, *Plant Relocation: A Case History of a Move* (1966) 22

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is unreported. The decision and order of the National Labor Relations Board are reported at 242 N.L.R.B. No. 72 (Pet. App. 21a-37a).

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1980 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 6, 1980, and granted on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 38a.

STATEMENT

1. Petitioner, a New York corporation, supplies employees to perform housekeeping and maintenance services at the premises of its various commercial customers. Petitioner hires its own employees and, as their sole employer, trains and supervises them in the performance of the contracted-for services at its customers' premises. During the spring of 1977, petitioner serviced between two and four nursing care institutions, including the Greenpark Care Center in Brooklyn, New York. Petitioner had been under contract with Greenpark since May 3, 1976, and employed approximately 35 employees there. (Pet. App. 28a-29a; A. 24-26, 31, 43-44, 63-64, 84.)[1] Under the contract petitioner supplied only labor and supervision while Greenpark furnished all the equipment, tools, and supplies (A. 43) and determined what equipment, tools, and supplies were necessary (A. 44).[2] The parties' contract required Greenpark to reimburse petitioner for its weekly payroll and fringe benefits for its employees at Greenpark and to pay petitioner a weekly "professional services fee," which initially was set at $500, but was reduced to $250 as of November 1, 1976 (A. 44, 46). The contract also provided for termination by either party upon 30 days' written notice (A. 44).

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[1] "A." refers to the appendix to the briefs in the court of appeals, copies of which have been lodged with this Court.

[2] Petitioner (Br. 2-3) erroneously states that it supplied tools, equipment, and supplies to Greenpark.

In the latter months of 1976, the Union[3] began an organizing campaign among petitioner's Greenpark employees (A. 123); and in an election conducted by the Board on March 31, 1977, the employees chose the Union as their collective bargaining representative. On May 11 the Board certified the Union as the employees' exclusive bargaining representative. By a July 12, 1977, letter to petitioner, the Union requested a meeting to negotiate a collective bargaining agreement. Petitioner never responded to the Union's letter (Pet. App. 4a, 29a, 31a).

In the interim, petitioner and Greenpark had been experiencing problems in connection with their contract (Pet. App. 31a). In March 1977, Greenpark gave petitioner 30 days' notice of its intent to cancel the contract on the grounds of a "lack of efficiency" of petitioner's maintenance staff, but the parties reached an accommodation and the work continued (Pet. App. 31a; A. 52, 126-128). Thereafter, in April 1977, petitioner told Greenpark that it was losing money on its Greenpark operation and needed an increase in order to be able to continue providing services at Greenpark (A. 71). The parties had several discussions about the matter in April, May, and June; Greenpark took the position that it could not afford an increase because of a recent cutback in Medicaid reimbursement (A. 71-72). On June 30, petitioner requested that its weekly professional services fee be increased $500, and on July 6 petitioner sent Greenpark a mailgram stating that, unless the requested increase were granted, petitioner's services

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[3] District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

would be discontinued as of August 1, 1977 (Pet. App. 31a; A. 40).[4]

The parties had several further discussions (A. 75). However, petitioner failed to receive the requested increase, and on July 25 it confirmed that it would terminate its services at Greenpark as of August 1, 1977 (Pet. App. 31a; A. 48). Petitioner never notified the Union of the intended closing (Pet. App. 4a, 29a-31a; A. 118).

On July 28, petitioner informed its Greenpark employees that as of July 31 the Greenpark operation would be closed and they would all be discharged (Pet. App. 4a, 29a, 31a). One of the employees then notified the Union of the anticipated closing (A. 117-118). Edward Wecker, the Union's vice-president, immediately telephoned the administrator of Greenpark, who confirmed that petitioner was terminating the contract and discharging the employees (A. 87, 91-92). When Wecker asked if Greenpark itself could retain the employees, the Greenpark administrator told him that the contract between petitioner and Greenpark prohibited Greenpark from hiring any of petitioner's employees for 90 days following termination of the contract (Pet. App. 31a; A. 44, 92-93).

Wecker then telephoned Leonard Marsh, a one-third owner and secretary-treasurer of petitioner, who stated that petitioner was "pulling out" because it was not making enough money. Wecker asked Marsh if he could "hold on a little longer" until the Union and petitioner could meet to discuss "how to keep the people working." Marsh refused, on the ground that, under the contract, petitioner would be required to remain at Greenpark for another full 30 days if it stayed past the notified termination date. Marsh

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[4] Petitioner characterized the requested increase as being one "in profits per week" (A. 40).

added that, if Wecker could persuade Greenpark to waive the 30-day provision, Marsh "might be able to swing" a discussion with the Union. Wecker inquired about the possibility of petitioner's hiring the employees for its other locations. Marsh responded in the negative. Marsh's response to Wecker's request that petitioner meet with the Union to discuss the matter was that they had "nothing to discuss" (Pet. App. 4a-5a, 29a, 31a-32a).

Thereafter, Wecker had telephone conversations and a meeting with representatives of Greenpark, but they told him that Greenpark could do nothing about petitioner's closing its Greenpark operation and discharging the employees (A. 98-101). On July 31, petitioner discontinued its Greenpark operation and discharged all of its Greenpark employees (Pet. App. 29a). Greenpark secured the services of another maintenance company to do the work (A. 78).

2. Relying in large part (Pet. App. 33a-34a) on this Court's decision in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), the administrative law judge rejected petitioner's contention that its decision to close its Greenpark operation was a management prerogative outside the scope of mandatory collective bargaining. The administrative law judge found that "[t]here was no capital involved" when petitioner decided to terminate the Greenpark job, that petitioner's "regular and unusual method of running its affairs" involves initiating and discontinuing work at various customer installations, and that "[t]he closing of this one spot in no sense altered the nature of its business, nor indeed, so far as appears, did it substantially affect its total size" (Pet. App. 33a). In these circumstances, "where it ha[d] not been shown that [petitioner's] decision to close involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate

direction of the enterprise,' " the administrative law judge concluded that petitioner had a duty to bargain with the Union about the decision to close the Greenpark operation (*ibid.*, quoting *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1003 (1977), enforcement denied and case remanded for additional evidence, 582 F.2d 720 (3d Cir. 1978)).

The Board upheld the administrative law judge's findings and conclusion that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain about the decision to close the Greenpark portion of its operations and the effects of the closing on the employees (Pet. App. 22a-23a).[5] The Board ordered petitioner, *inter alia*, to bargain with the Union about the decision to terminate the Greenpark operation and the possible resumption of it; if an agreement to resume the Greenpark operation were reached, to offer reinstatement at that operation to the discharged employees and to embody any such understanding in a written agreement; or if an agreement to resume the Greenpark operation were not reached, to bargain with the Union concerning the effects of the termination decision and to offer the terminated employees reinstatement to positions for which they were qualified at any of

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[5] No issue is presented here concerning the Board's finding that petitioner unlawfully refused to bargain about the *effects* of the closing on the employees, since petitioner consented to enforcement of that portion of the Board's order by stipulation filed in the court of appeals (Pet. App. 5a; A. 21-22). Nor has petitioner ever disputed the Board's additional conclusion (Pet. App. 21a-22a n.1) that petitioner also refused to bargain with the Union, in violation of Section 8(a)(5) and (1), by failing to respond to the Union's July 12, 1977, letter demanding such bargaining (Pet. App. 5a). Thus, only the Board's determination that petitioner was required to bargain concerning its decision to terminate its Greenpark operation is at issue here.

petitioner's other cleaning and maintenance operations (Pet. App. 22a-23a, 25a). The Board's order also directs petitioner to make whole the terminated employees by payment of back pay until the occurrence of the earliest of four specified conditions (Pet. App. 23a, 25a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3a-20a). Although it recognized (Pet. App. 11a; footnote omitted) that a "partial closing affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute," the court emphasized (Pet. App. 10a-12a) that there is no *per se* rule mandating bargaining about all partial closing decisions. Rather, it explained (Pet. App. 12a): "[T]he presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain."

The court concluded (Pet. App. 13a-14a) that no such showing was made on the facts of the present case. It found material neither petitioner's assertion that it was losing money at Greenpark nor the fact that petitioner's financial losses were not attributable to labor costs (since, under the contract, Greenpark paid petitioner's employees' salaries and fringe benefits).[6] In the court of appeals' view, "the decisive factor * * * is whether, regardless of the origin of the cost which precipitated a management decision to terminate an operation, bargaining could reasonably

[6] It was primarily on the basis of those two factors that Judge Kearse dissented from that portion of the court's decision upholding the Board's conclusion that petitioner violated Section 8(a)(5) and (1) by refusing to bargain over the decision to close Greenpark (Pet. App. 16a-20a).

be expected to modify or reverse that decision" (Pet. App. 14a). The court found (*ibid.*) "[o]n the record here * * * sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give [petitioner] an increased management fee." "At least," the court concluded (*ibid.*), if petitioner "had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution."

SUMMARY OF ARGUMENT

1. Sections 8(d), 8(a)(5) and 9(a) of the National Labor Relations Act impose a duty upon an employer to bargain with the collective bargaining representative of its employees about "terms and conditions" of employment. Congress deliberately defined the scope of such mandatory bargaining in broad terms and allocated to the Board the primary responsibility to work out the limits of mandatory bargaining on a case-by-case basis. Guided in large measure by principles enunciated by this Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), the Board has evolved a general rule that an employer's decision to terminate employees in carrying out a partial closing of its operations is a mandatory subject of bargaining absent circumstances showing that bargaining would be futile or would significantly interfere with the employer's right to manage its business.

2. a. Many factors support the propriety of this rule. The words "terms and conditions of employment" plainly cover the termination of employment

(*Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 210) whether that termination results from subcontracting, as in *Fibreboard*, or from a partial closing, as in this case.

b. Application of such a rule can benefit both employees and employers and effectuate the fundamental purpose of the Act, the maintenance of industrial peace. By bargaining about a decision to curtail operations, an employer can judge the probable labor costs of the closing—*e.g.*, severance pay—in advance and can learn of any concessions in wages, manning, or work procedures that the employee representative may be willing to make to avert the closing. This makes any decision to carry out the closing a more fully informed decision, and it makes bargaining over the effects of the decision—which all agree is required by the Act—more effective. If the employee representative cannot persuade the employer to avoid the closing, it can at least, in this early stage, make suggestions concerning the timing and implementation of the closing that will moderate the impact on the employees.

c. As in *Fibreboard*, the lessons of industrial practice reinforce the Board's rule respecting a decision to curtail operations and discharge employees. Such matters have been successfully provided for in collective bargaining agreements, and even apart from contractual provisions, labor history is replete with instances in which employees have made concessions concerning their wages, hours, and working conditions in order to make their employers' operations more profitable and save their own jobs. Experience has also demonstrated that, where a closing cannot be avoided, advance discussion about the decision

maximizes the chances of an orderly, peaceful implementation of the decision.

d. The Board's application of its rule—which, in accordance with the teachings of *Fibreboard*, requires consideration of all the circumstances in each case—is not an undue interference with entrepreneurial control. The obligation to bargain is not an obligation to engage in marathon discussions, and, if the parties are unable to work out an alternative to a partial closing through good faith bargaining, the employer is free to implement its decision. In addition, the Board makes exceptions in cases in which bargaining would be futile—*e.g.*, where labor costs can have no bearing on the decision—or where, as in the case of emergencies necessitating an immediate closing, the obligation to bargain would significantly interfere with the employer's right to manage its business. This flexible rule, which accommodates the interests of both the employer and the employees, better effectuates the purposes of the Act than the blanket exemption, urged by the dissenting judge below and some courts of appeals, for any case in which the employer's decision may be characterized as a matter of fundamental entrepreneurial discretion.

3. This Court's decision in *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), supports the Board's decision here. The Court there recognized that a dispute over an employer's decision to close some of its stations and eliminate unit jobs was a controversy concerning "terms and conditions of employment" within the meaning of Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. 113(c), and the Court rejected the argument that an employee strike to protest the station closings was an attempt to usurp the prerogatives of management. Similarly, as the Board did

here, the Court relied on the lessons of industrial experience and the congressional policy, manifested in the relevant statute, favoring settlement of disputes over working conditions through collective negotiations.

4. *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), is not inconsistent with the Board's decision here. In that case the Court was considering not the scope of an employer's bargaining obligation but the limits of Section 8(a)(3) of the Act, a section that outlaws discrimination in the terms or conditions of employment for the purpose of encouraging or discouraging union membership. The Court held that Section 8(a)(3) does not forbid an employer from going entirely out of business in order to avoid unionization and that it prohibits an employer's discriminatory partial closing only where the closing is motivated by a purpose to chill unionism in the employer's remaining operations.

There is nothing inconsistent in holding that Section 8(a)(5) of the Act requires an employer to bargain about partial closing decisions that it is not forbidden to implement by Section 8(a)(3). Under Section 8(a)(5) the Board does not seek to regulate the content of the employer's decision or to prohibit the employer from implementing its decision after a bargaining impasse is reached. Rather, the Board's concern is with the process of good faith bargaining. Of course, where the employer's decision is predicated on unlawful motives, bargaining is unlikely to be useful. But where, as here, the employer's decision is based solely on economic considerations, experience has demonstrated that bargaining about the employer's partial closing decision can be beneficial to both labor and management and foster the Act's purpose of achieving industrial peace.

5. The propriety of requiring bargaining over partial closing decisions is well illustrated by the facts of this case. Whether or not petitioner's decision was formally predicated on labor costs, matters such as wages, benefits, work practices, and crew size were highly relevant to that decision; and, as the court below found, the record affords sufficient reason to believe that, had the employees been given the opportunity, they might have made concessions that would have permitted petitioner and Greenpark to continue their business relationship on a mutually satisfactory basis. Two weeks were available for negotiation if petitioner had only responded to the Union's request for recognition and bargaining. There is no evidence that bargaining with the Union would have significantly interfered with petitioner's right to manage its business. Petitioner does not contend that reasons of business secrecy or other special circumstances precluded it from negotiating with the Union, and indeed it was willing to have the Union attempt to work out a satisfactory solution with Greenpark but gave it no time to do so.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS ACT OBLIGATES AN EMPLOYER TO BARGAIN WITH THE EMPLOYEES' UNION REPRESENTATIVE ABOUT AN ECONOMIC DECISION TO CLOSE PART OF ITS OPERATION ABSENT CIRCUMSTANCES SHOWING THAT BARGAINING WOULD HAVE BEEN FUTILE OR WOULD HAVE SIGNIFICANTLY INTERFERED WITH THE EMPLOYER'S RIGHT TO MANAGE ITS BUSINESS

The process of collective bargaining between employers and the representatives of their employees inherently constrains the freedom of each side to act totally without regard to the interest of the other

and to make its decisions in ignorance of any compromises that the other might be willing to make with respect to matters affecting both. A fundamental premise of the National Labor Relations Act is that this limited constraint is ultimately beneficial to both parties to the collective bargaining process and that the national interest is best served when existing and potential disputes between employers and employees are resolved in this manner. See 29 U.S.C. 151. In accordance with this premise, Congress has deliberately given broad scope to the bargaining obligation imposed by the Act.

As originally enacted, the Act did not directly specify the subjects about which employers and unions must bargain. Section 8(a)(5) of the Act, now codified at 29 U.S.C. 158(a)(5), simply declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 49 Stat. 453. Section 9(a), in turn, provides that a union selected by a majority of the bargaining unit shall be the collective bargaining representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 49 Stat. 453 (now codified at 29 U.S.C. 159(a)).

Section 8(d) of the Act, which is the focal point of this case, was added to the Act in 1947 by the Taft-Hartley Amendments. 61 Stat. 142 (now codified at 29 U.S.C. 158(d)). This provision, using language essentially parallel to that found in Section 9(a), made explicit what was implicit in the original Act:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at rea-

> sonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *.

Read together, the foregoing provisions of the Act "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment * * *.' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bargain * * *." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210 (1964), quoting *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

As this Court has explained, it fell to the Board under the 1935 Act to determine, on a case-by-case basis, which subjects came within the bargaining obligation; and, in enacting Section 8(d) in 1947, "Congress made a conscious decision to continue its delegation to the Board of the primary responsibility" in that area. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979).[7] It has thus been the Board's task to

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[7] As the Court explained in *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 495-496 (footnote omitted):

> The original House bill had contained a specific listing of the issues subject to mandatory bargaining, H.R. 3020, 80th Cong., 1st Sess., § 2(11) (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess., 22-23, 49 (1947), but this attempt to "straight jacke[t]" and to "limit narrowly the subject matters appropriate for collective bargaining," *id.*, at 71 (minority report); see also 93 Cong. Rec. 3446-3447 (1947) (remarks of Rep. Klein), was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d). S. 1126,

work out the meaning of the statutory phrase "terms and conditions of employment"—and the scope of the concomitant bargaining obligation—in the light of the purposes of the Act and the knowledge the Board has gained from adjudicating a progression of cases that reflect the changing industrial conditions in which collective bargaining has taken place.[8]

The present case concerns the propriety of the Board's conclusion with respect to the obligation of an employer to bargain about a decision, made on economic grounds, to close down a part of its operations and eliminate jobs of unit employees. In evolving a rule governing this subject, the Board has been guided in large measure by principles enunciated by this Court in *Fibreboard Paper Products Corp.* v. *NLRB, supra.*

In *Fibreboard,* the Court sustained the Board's conclusion that the employer was required to bargain collectively about a decision to contract out plant maintenance work previously performed by employees in the bargaining unit. The Court found that the "termination of employment which * * * necessarily results from the contracting out of work performed by members of the established bargaining unit" is

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80th Cong., 1st Sess. § 8(d) (1947); see 93 Cong. Rec. 6444 (1947) (summary report of Sen. Taft); cf. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 8, 34 (1947).

[8] Here, as with comparable provisions of the Act, "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer * * * [a]nd so, it is not surprising that the Board has more or less felt its way * * * and has modified and reformed its standards on the basis of accumulating experience." *Electrical Workers* v. *NLRB,* 366 U.S. 667, 674 (1961). Accord, *NLRB* v. *Weingarten,* 420 U.S. 251, 264-266 (1975).

"well within the literal meaning of the phrase 'terms and conditions of employment' " (379 U.S. at 210). The Court added that to hold that "contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace" (*id.* at 211). The Court further found that "industrial practices in this country" reinforced the conclusion that "contracting out" is a statutory subject of bargaining; provisions relating to contracting out exist in numerous collective bargaining agreements (*id.* at 211-212). Finally, the Court found that the "Company's decision to contract out the maintenance work did not alter the Company's basic operation," and that therefore "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business" (*id.* at 213). Indeed, as the Court concluded (*id.* at 213-214), the reasons for the employer's decision to contract out—that "economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments"—involved "matters peculiarly suitable for resolution within the collective bargaining framework."

Applying these principles on a case-by-case basis, the Board has concluded that an employer's economic decision to close part of its operations and eliminate unit employees' jobs is a decision to alter their "terms and conditions of employment" within the meaning of Section 8(d) of the Act, and the Board has evolved a rule that an employer is obligated to bargain with the employees' representative before making such a radical change in their conditions of employment absent circumstances showing that bargaining would have been futile or would have significantly inter-

fered with the employer's right to manage its business. This position has been approved by not only the court below in this case, but also by the Third Circuit in *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720 (1978), remanding 230 N.L.R.B. 1002 (1977).[9] We show below that the Board's position is consistent with *Fibreboard* and other relevant decisions of this Court.

A. The Language and the Purpose of the Act, As Well As the Lessons of Industrial Practice, Support the Board's Conclusion that, as a General Rule, the Partial Closing of a Business Operation is a Mandatory Subject of Bargaining

1. As this Court observed in *Fibreboard* (379 U.S. at 210), the words "terms and conditions of employment" plainly cover termination of employment. The language is no less applicable where unit employees are terminated as a result of the employer's decision to close down a part of its operations, than it is where, as in *Fibreboard*, they lose their jobs as a result of the employer's decision to contract out the work they had performed.[10]

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[9] Both courts begin their analysis with a presumption that an issue so directly affecting employee job rights as a decision to terminate part of an enterprise is subject to mandatory bargaining (Pet. App. 11a; 582 F.2d at 735). Both courts hold, however, that that presumption may be rebutted by countervailing employer evidence demonstrating, for example, that bargaining over the decision at issue would be futile or that the closing was necessitated by emergency financial considerations (Pet. App. 11a-12a; 582 F.2d at 738-739). See also Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks* v. *NLRB*, 92 Harv. L. Rev. 768 (1979).

[10] In this brief, and in decisions of the Board and the courts on this question, the subject of bargaining is often referred to simply as a "partial closing." It is evident from the facts

Here also, as in *Fibreboard*, requiring the employer to bargain about the decision to take action directly resulting in the elimination of bargaining unit work would effectuate the fundamental purpose of the Act to promote the peaceful settlement of industrial disputes "by bringing a problem of vital concern to labor and management within the [collective bargaining] framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 211.[11]

The value of bringing such decisions into the collective bargaining process is manifested in several different ways. First, because labor costs or work rules

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of all of those decisions, however, that only partial closings that affect unit employees' jobs are concerned, and we use the term in that limited sense in this brief. An employer who closes down a part of his operations in which represented employees have neither jobs nor transfer rights obviously has no obligation to bargain about that decision with any union representing employees in other parts of his operations (unless the closing would affect the working conditions of those employees). Thus, the bargaining subject could perhaps more aptly be identified as "termination of bargaining unit work," with subcategories for terminations pursuant to contracting-out decisions and terminations pursuant to partial closing decisions.

[11] Petitioner contends (Pet. Br. 18-20) that to treat a partial closing decision as a mandatory bargaining subject is likely to increase, rather than lessen, industrial strife, for a union would then be entitled to strike in support of its demand that the employer not close down. This contention is contrary to the congressional judgment that underlies the Act—*i.e.*, that subjecting labor-management controversies to the mediatory influence of negotiation is likely to lessen, rather than increase, strikes. See declaration of policy set forth in Sections 1 and 101 of the Labor-Management Relations Act, 29 U.S.C. 141, 151; *NLRB* v. *Jones & Laughlin*

will often be relevant to a decision, made on economic grounds, to close part of an operation, the union will, at the very least, generally be able to provide information relevant to that decision. Even if the union is unwilling to make concessions on wages or work procedures that would make the existing operation more profitable, the employer may decide that the projected shutdown "would cost it more in terms of post-termination expenses, as in severance pay, than it would save." *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 736. Moreover, if discussion takes place before, rather than after, a shutdown decision becomes final, the union may at least "make suggestions about the decision's timing and implementation in order to moderate the closing's impact on the work force." *Ibid.*[12]

Steel Corp., 301 U.S. 1, 42 (1937). Thus, recognizing a partial closing decision as a mandatory bargaining subject would insure that the employees and their union representative are given advance notice of the contemplated decision and an opportunity to negotiate about it, rather than being presented with a *fait accompli*. Experience has shown (see *infra*, pages 20-23) that, where this has occurred, it has been conducive to industrial peace and beneficial to both labor and management. And, contrary to petitioner, it is Congress's view that in the long run "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties" (*NLRB* v. *Insurance Agents' Internat'l Union*, 361 U.S. 477, 489 (1960)) reduces strife by permitting vital issues in the employment relationship to be resolved in free collective bargaining in accordance with the relative economic strength of the participants. *Id.* at 489-490, 495.

[12] As the Board has observed in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 570 (1966), in some cases "the effects [of a partial closing] are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised."

Second, because the severe consequences for employees of a partial shutdown may be mitigated only slightly by bargaining about the effects of the shutdown [13] or by unemployment compensation laws and the variety of other state and federal programs providing assistance to workers who lose their jobs,[14] the union, in fact, has a strong incentive to discuss practical alternatives to the decision to close, since persuading the employer to reverse the decision may be the only adequate way to protect the employees. As the Third Circuit observed, "labor history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs." *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 736. See Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks* v. *NLRB*, 92 Harv. L. Rev. 768, 777-779 (1979); Rabin, *Fibreboard and the Ter-*

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[13] The obligation to bargain about the effects of a partial closing is not questioned here (note 5, *supra*), and in any event is well settled (see Pet. App. 16a, concurring and dissenting opinion).

[14] See *Employee Protection and Community Stabilization Act of 1979: Hearings on S. 1609 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. (1979) (hereinafter *EPCSA: 1979 Senate Hearings*); *Employee Protection and Community Stabilization Act of 1980: Hearings on S. 1609 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. (1980) (hereinafter *EPCSA: 1980 Senate Hearings*); *Hearings on Plant Closing Problems: Hearings on H.R. 5040 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. (1980) (hereinafter *House Plant Closing Hearings*).

mination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain, 71 Colum. L. Rev. 803, 823-826 (1971). Successful bargaining over these matters is not only widely reported today,[15] but has been a matter of judicial notice by this Court[16] and the subject of scholarly study.[17]

Third, even if after good faith bargaining between the employer and the union, the employer remains

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[15] See, *e.g.*, *Now, It's Pay Cuts Instead of Raises*, U.S. News & World Report, Feb. 9, 1981, at 74 (reporting several wage concessions in the rubber and steel industry); Wash. Post, Feb. 3, 1981, at E1, col. 4 (reporting that Chrysler employees had ratified a wage and benefit concession that averaged $46 per week per worker); *How Cooper Tire Stays Healthy*, N.Y. Times, Feb. 2, 1981, at D1, col. 3 (reporting how the danger of a plant closing was averted after the employees agreed to a new contract containing benefit concessions and new wage rates designed to reward productivity); Wall St. J., Mar. 4, 1981, at 20, col. 3 (reporting that Braniff flight attendants accept 10% pay cut to help cash-short company); Ruben, *Industrial Relations in 1980 Influenced by Inflation and Recession*, 104 Monthly Lab. Rev. 15-16 (Jan. 1981) (reporting various employee concessions, including an agreement to speed up the production line in order to avert a plant closing); *Bitter Choice: Some Workers Accept Pay Cuts as Alternative to Losing their Jobs*, Wall St. J., July 23, 1971, at 1, col. 6 (reviewing wage concessions by rubber workers, paper-mill employees, watch makers, and cab drivers).

[16] *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 & n.5 (1956) (noting that unsatisfactory business conditions had prompted employees in several industries to accept pay cuts).

[17] See, *e.g.*, Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations*, 26 Indus. & Lab. Rel. Rev. 956 (1973); Greenberg, *Deviations From Wage-Fringe Standards*, 21 Indus. & Lab. Rel. Rev. 197, 207-208 (1968); S. Slichter, J. Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* 824-851 (1960).

convinced of the soundness of its decision to close down part of its operations, the discussions with the union will often have served a useful purpose. If the parties have focused on the decision to close as well as its effects, they may be able, as we have previously suggested (page 19, *supra*), to agree on a way of carrying it out that lessens the severity of its impact on the employees. Furthermore, an employer's candid discussion of the economic necessity for the closing can assure the employees that the action is being taken in good faith and is unavoidable. Such assurance is indispensable if the parties are to give their undivided attention to devising constructive measures that will assist the employees in adjusting to the impending change.

Contrary to petitioner's fears (Pet. Br. 18), a number of employers have found that candid discussion of these matters pays practical dividends: the employees cooperate in the transition, productivity is maintained or increased, and the legitimate interests of the employer, the employees, and the public are peacefully accommodated.[18] Indeed, quite apart from

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[18] See, *e.g.*, Testimony of Carroll H. Teague, Vice President, Personnel and Labor Relations, Brown & Williamson Tobacco Corp., before the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. (Sept. 17, 1980), *reprinted in* BNA Daily Lab. Rep., at D-1 (Oct. 2, 1980); Hershey, *Layoff Ahead: How Do Employees Respond?*, 49 Personnel 29-35 (Nov. 1972); *'Out of Business': A Plant Shutdown is Always Painful, But it Need Not Be Merciless*, Wall St. J., Feb. 28, 1972, at 1, col. 6; A. Slote, *Termination: The Closing of Baker Plant* 5-7, 25, 37-39, 69-79, 322 (1969); E. Whitman and W. Schmidt, *Plant Relocation: A Case History of a Move* 91, 101-103, 154-158 (1966).

any legal obligation to bargain over the employer's decision, management experts have advocated advance notice and frank discussion of the reasons for the decision on the practical ground that a demonstrated regard for the interests of the employees maximizes the chances of a peaceful transition. See, *e.g.*, Thompson, *How to Avoid People Problems in a Plant Relocation*, 67 Management Rev. 32-34 (Sept. 1978); Watson, *A Sensible Approach to Mass Layoffs*, 3 Pub. Personnel Management 233, 236-237 (1974).[19]

The practicality of negotiating over a proposed decision to terminate bargaining unit work through a partial shutdown of operations is, finally, indicated by the fact that some employers and unions have successfully negotiated contract provisions covering such events. See *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 211-212. As petitioner has noted (Pet. Br. 21-23), provisions governing plant

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[19] Conversely, the failure to engage in frank discussion about matters of such vital concern to employees has been productive of suspicion, recrimination, and industrial strife. For example, economically-motivated plant closing decisions, when not candidly explained, often give rise to a belief that the reason for the closing is discriminatory, and protracted litigation over the employer's true motivation has often resulted. See, *e.g.*, *Thompson Transport Co.*, 165 N.L.R.B. 746, 752-754 (1967), enforcement denied in part, 406 F.2d 698 (10th Cir. 1969); *McLoughlin Mfg. Corp.*, 164 N.L.R.B. 140, 146-147 (1967), supplemental decision after remand, 182 N.L.R.B. 958, 962-964 (1970), enforced, 463 F.2d 907, 919-921 (D.C. Cir. 1972); *Production Molded Plastics, Inc.*, 227 N.L.R.B. 776, 777-778, enforced, 604 F.2d 451, 452 (6th Cir. 1979). In each of the foregoing cases, the Board, although finding that the employer's refusal to bargain violated Section 8(a)(5) of the Act, dismissed complaint allegations, which the administrative law judge had sustained, that the closing was discriminatorily motivated.

shutdowns appear to be less frequent than provisions governing the practice of contracting out; but this is not surprising in view of the fact that shutdowns are less likely than contracting out to occur in reasonably sound companies, and hence less likely to be anticipated by employers and employees. As plant closings become a more serious and widely publicized problem, however (see note 14, *supra*), an increase in the frequency of such provisions may well occur.[20] In any

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[20] See, *e.g.*, *House Plant Closing Hearings* at 219 (expressing intent of unions to meet increasingly severe plant closure problem with contract provisions); *EPCSA: 1980 Senate Hearings* at 73 (same). The proposed legislation considered at these hearings would go far beyond the National Labor Relations Act, as the Board has construed it, in imposing obligations on employers with respect to plant shutdowns. For one thing, both S. 1609 (96th Cong., 1st Sess. (1979)) and H.R. 5040 (96th Cong., 1st Sess. (1979)) would apply to total plant shutdowns as well as partial terminations of operations and to nonunionized businesses as well as to those in which the employees have collective bargaining representatives. S. 1609, §§ 3(6), 3(7) and 3(10); H.R. 5040, §§ 3(5), 3(12). The legislation would, moreover, establish minimum periods of up to two years, depending on the size of the establishment, for notice of an impending shutdown, and such notice would have to be given to communities, all affected employees, and the Secretary of Labor, as well as to any collective bargaining representative (S. 1609, § 4(a); H.R. 5040, §§ 4(a), 4(b)(3)(A)). Employers would also be required to file statements explaining the reasons for proposed closures with the Secretary of Labor, and the Secretary would be empowered to investigate, conduct hearings, and issue a report with recommendations respecting an employer's proposed shutdown of operations. S. 1609, §§ 4-6; H.R. 5040, §§ 4-6.

Minority counsel for the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor sought to suggest that the legislation was unnecessary because of the existence of collective bargaining rights under

event, the contractual evidence is surely no indication that the subject of partial closings that eliminate bargaining unit work is not amenable to the collective bargaining process. 379 U.S. at 211.

In sum, as was the case with the contracting-out decision considered in *Fibreboard*, a general rule requiring bargaining about a decision to close part of an employer's operations is consistent with the language of the Act, takes account of industrial realities, and effectuates the purpose of the Act—the promotion of industrial peace—by increasing the possibility that job losses may be avoided through union-management cooperation and, where they cannot be avoided, by facilitating both employee acceptance of the necessity of such losses and joint labor-management planning to reduce their impact. For these reasons the Board properly construed the Act and followed this Court's decision in *Fibreboard* in concluding that an employer's economically motivated decision to terminate a portion of its business is a subject on which Section 8(d) generally mandates bargaining.[21]

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the National Labor Relations Act with respect to plant closures. *House Plant Closing Hearings* at 101, 214-215. The union witnesses acknowledged the existence of Board remedies, but asserted that the additional remedies in the proposed bill were also needed because the results of negotiations were not always satisfactory. *Ibid.* Similarly, other witnesses at both the House and Senate hearings expressed dissatisfaction with bargaining over decisions to close because they believed the process unduly favored employers, enabling them to extract substantial concessions in wages and work rules from unions in exchange for maintaining plant operations. *EPCSA: 1980 Senate Hearings* at 105, 272; *EPCSA: 1979 Senate Hearings* at 316-317; *House Plant Closing Hearings* at 292.

[21] See, *e.g.*, *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788 (1964), enforced in pertinent part, 361 F.2d 512, 516-517

2. Like the Court in *Fibreboard* (379 U.S. at 213-214), however, the Board, in recognition of the need to accommodate the employer's legitimate interests, has acknowledged exceptions to this general rule where the circumstances indicate that bargaining would have been futile—*e.g.*, when the employer's economic position is such that no concessions the union could conceivably offer the employer would permit continued maintenance of the operations—or that bargaining would otherwise have significantly interfered with the employer's right to manage its business.[22]

(5th Cir.), cert. denied, 385 U.S. 935 (1966) (termination of cheese cutting and packing operation); *Ozark Trailers, Inc., supra* (closing of one of several plants); *Brockway Motor Trucks*, 230 N.L.R.B. 1002 (1977), enforcement denied and case remanded for additional evidence, 582 F.2d 720 (3d Cir. 1978), reaff'd on remand, 251 N.L.R.B. No. 23, 104 L.R.R.M. 1515 (Aug. 11, 1980), petition to review, No. 80-2327 (3d Cir., filed Sept. 19, 1980) (same); *Electrical Products Div. of Midland-Ross Corp.*, 239 N.L.R.B. 323, 329-330 (1978), enforced, 617 F.2d 977 (3d Cir. 1980), cert. denied, No. 80-67 (Oct. 6, 1980) (same); *ABC Trans-National Transport, Inc.*, 247 N.L.R.B. No. 25, 103 L.R.R.M. 1116 (Jan. 11, 1980), aff'd on merits but remanded for reconsideration of remedy, No. 80-1155 (3d Cir. Feb. 19, 1981) (closing of freight terminal).

[22] See, *e.g.*, *Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76, 102 L.R.R.M. 1606, 1607 (Nov. 16, 1979) ("the Board does not require an employer to bargain over the closing of an operation in situations, such as here, where the decision is predicated on economic factors so compelling that bargaining could not alter them"); *Raskin Packing Co.*, 246 N.L.R.B. No. 15, 102 L.R.R.M. 1489, 1490-1492 (Oct. 15, 1979) (sudden cancellation of line of credit made immediate closing necessary and made bargaining infeasible); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972), enforced on other grounds, 474 F.2d 1352 (7th Cir. 1973) ("[w]e do not believe that the Act contemplated eliminating the prerogative of an employer, as

Recognizing the interest of the employer in eschewing bargaining in such circumstances does not, however, logically require permitting employers to avoid bargaining about an economic decision affecting employees in *every* case in which it may be said that that decision involves subsidiary decisions respecting capital investment or can be characterized, in the words of the dissenting judge below (Pet. App. 19a), as "a matter of fundamental entrepreneurial discretion." In employing such reasoning, the dissenting judge below and other courts of appeals which have held that an economic decision to close a portion of an operation is not a mandatory bargaining subject under Section 8(d) of the Act (see cases cited at Pet. Br. 30-32), have relied on the statement in the concurring opinion in *Fibreboard* (379 U.S. at 223, Stewart, J., concurring) that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."

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here, to eliminate itself as an employer" by closing down a distinct line of business); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), aff'd, 470 F.2d 422 (D.C. Cir. 1972) ("decision to withdraw capital from a company-operated facility and relinquish operating control to an independent dealership is very much 'at the core of entrepreneurial control' "). Cf. *Sucesion Mario Mercado E Hijos d/b/a Central Rufina*, 161 N.L.R.B. 696 (1966) (no duty to bargain where compelling economic circumstances necessitated employer's decision to cease certain of its operations and contract out this work; " 'our condemnation in *Fibreboard* and like cases of the unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved' " (*id.* at 700, quoting *Westinghouse Electric Corporation (Mansfield Plant)*, 150 N.L.R.B. 1574, 1576 (1965)).

But such reliance on that portion of the *Fibreboard* concurrence creates a blanket exemption for any management decisions that may be termed "fundamental to the basic direction of a corporate enterprise" (379 U.S. at 223); and such an exemption is not warranted by the Court's opinion in *Fibreboard*, which holds that the determination whether a subject is within the area of mandatory bargaining is to be determined on the basis of a careful consideration of all of the relevant circumstances. Moreover, as the Third Circuit explained in rejecting a similar argument in *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 737, such an argument rests on the premise that labor has no appropriate role in discussing "complex issues of a managerial nature" and it thereby "paints with too broad a brush." As the court explained (*ibid.*; footnote omitted):

> Like any important action by an employer, including that of subcontracting, the decision to close a portion of an employer's operations has many components. With regard to some aspects of an employer's decision, the union perhaps may not be an expert or, even, a particularly helpful interlocutor. But that observation does not in any way defeat the proposition that with respect to other aspects of such a determination—especially those bearing upon the production costs of labor and the labor-related expenses involved in carrying the decision into effect—the union is fully apprised of relevant and important facts, and could well make a contribution that might enable the employer to keep the plant in question economically viable.

A rule requiring an employer, in non-emergency circumstances, to gather information relevant to a decision to close part of its operations and to engage in

good faith discussion with an interested party concerning possible alternatives to closing is hardly an unwarranted interference with entrepreneurial control. See Comment, *supra*, 92 Harv. L. Rev. at 775-776. Of course, where circumstances are such that labor costs and work rules can have no bearing on a decision to close, then the decision is one for management alone and the Board would not require bargaining.

Petitioner (Pet. Br. 18) and the Chamber of Commerce of the United States as amicus curiae (Chamber Br. 2, 19) further contend that to require bargaining about partial closing decisions would hamper the employer in promptly responding to eliminate marginal or uneconomic operations. The duty to bargain does not, however, include a duty to agree, nor does it impose a duty to engage in marathon discussions. *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 210, 214; *Shell Oil Co.*, 149 N.L.R.B. 305, 307 (1964). Accordingly, if the parties are unable to agree and an impasse is reached, the employer remains free to implement its proposed decision. And, in situations where bargaining would clearly be futile or otherwise impracticable, no obligation is imposed (see note 22, *supra*). Moreover, petitioner's and the Chamber's exclusive focus on management's interest in being able to make closing decisions without first notifying and negotiating with the union ignores the "countervailing interests of the employees in a decision immediately affecting their fortunes." *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 734 n.83. As the Board pointed out in *Ozark Trailers, Inc.*, *supra*, 161 N.L.R.B. at 566:

> [J]ust as the employer has invested capital in the business, so the employee has invested years of

> his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

In sum, the Board's approach to partial closing cases gives appropriate weight to the employer's interest in managing its business efficiently without unnecessarily sacrificing the employees' interest in attempting, through collective bargaining, to save their jobs. Where decision bargaining would inevitably be only a useless delay or where pausing to bargain would prevent the employer from taking steps critical to the financial well-being of the total enterprise, the Act, as the Board construes it, imposes no bargaining obligation. Where such circumstances do not exist, the Board properly reads the Act as requiring the employer to afford its employees' bargaining representative an opportunity to persuade it that other modifications in wages, hours, or terms and conditions of employment may so alter the employer's economic position that the proposed curtailment of operations can be avoided.

B. The Board's Conclusion that a Decision to Close Part of an Operation is Ordinarily a Mandatory Bargaining Subject is Further Supported by this Court's Decision in *Railroad Telegraphers*

In *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), the railroad, operating at a loss, decided to abolish some stations and consolidate others—an action that would have resulted in a reduction of the number

of its employees. The railroad offered to negotiate about severance pay for the employees dismissed, but it refused to negotiate with the bargaining representative about its decision to abolish the jobs, contending that this was a management prerogative. When the union threatened a strike in order to secure an agreement that no unit jobs would be eliminated without its consent, the railroad sought an injunction, arguing that its issuance was not barred by the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, because the case was not one "involving or growing out of any labor dispute" (29 U.S.C. 104). The term "labor dispute" is defined in the Norris-LaGuardia Act as "any controversy concerning terms or conditions of employment" (29 U.S.C. 113(c)). The Court rejected the railroad's contention, saying (362 U.S. at 335-336):

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. * * *
>
> Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. * * *

The Court also rejected the argument, accepted by the court of appeals, that an employee strike to prevent the station closings " 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the

most economical and efficient conduct of its operations' " (362 U.S. at 336; footnote omitted). Noting that the vast majority of railroads and unions had long negotiated collective agreements designed to ameliorate the effects of management decisions resulting in the displacement of employees, the Court concluded that "[i]t is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large" (*id.* at 338).

Finally, the Court rejected the railroad's argument that the union was acting unlawfully under the Railway Labor Act in pressing its demand that the railroad bargain over the station closings, stating (*id.* at 339):

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First.

As we have shown (*supra*, pages 17-25), the same considerations have entered into, and support the propriety of, the Board's conclusion that, as a general rule, the decision to close part of an operation is a mandatory bargaining subject under Section 8(d) of the National Labor Relations Act.[23]

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[23] Indeed, the phrase "working conditions" in the Railway Labor Act is narrower than the phrase "terms and conditions of employment" in Section 8(d) of the National Labor Relations Act. See *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 254-255 (7th Cir. 1948), cert. denied on this point, 336 U.S. 960

C. The Board's Conclusion is Not Inconsistent with this Court's Decision in *Darlington*

Contrary to the contention of the Chamber of Commerce of the United States (Chamber Br. 8-11), the Board's conclusion that there is ordinarily a duty to bargain about a partial closing is not inconsistent with this Court's decision in *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

In *Darlington*, the Court held that an employer does not violate Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3)—which bars discrimination in employment aimed at discouraging union membership—by closing its entire business operation, even though the liquidation is motivated by vindictiveness toward the union. The Court reasoned that the "closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place" (380 U.S. at 274). The Court distinguished "a discriminatory partial closing," which "may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees"; and it noted further that "a possible remedy open to the Board in such a case * * * is to order reinstatement of the discharged employees in the other parts of the business" (*id.*

(1949) ("A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act."). And the definition of "labor dispute" in Section 2(9) of the National Labor Relations Act, 29 U.S.C. 152(9), is taken from the earlier Norris-LaGuardia Act. See S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935).

at 274-275). Accordingly, the Court held that "a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect" (*id.* at 275).

The Court, noting (380 U.S. at 267 n.5) that "no argument is made that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise," did not pass on that question. The Chamber nonetheless contends (Br. 8-11) that construing the Act to impose a duty to bargain about an economic decision to close part of a business operation is inconsistent with the holding in *Darlington* that an employer may close part of a business even for anti-union reasons without violating Section 8(a)(3) unless it is shown that there was an intention to chill unionism in the remainder of the business. This argument is without merit.

First, in noting that no argument was made concerning the requirements of Section 8(a)(5) respecting a business decision to terminate an enterprise, the Court was taking account of the fact that the Board did not argue the point in its brief in *Darlington*. But neither the Board in its brief nor the Court in *Darlington* suggested that a bargaining obligation would be inherently inconsistent with the notion that an employer has the right—or the prerogative—to close down a plant for economic reasons. Thus, in its *Darlington* brief, the Board stated (Br. 28) that it "fully recognize[d] the businessman's privilege to make and put into effect business decisions, including a decision to close a plant, for normal economic motives." But it added (Br. 28 n.24):

> Since the closing here was found not motivated by economic considerations, there is no need to consider how far there is a duty to bargain concerning a projected curtailment of operations or the abandonment of a business for economic reasons. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, No. 14, this Term. In any event, the duty to negotiate with the union is not a duty to agree.

Then, as now, the Board properly saw nothing inconsistent in acknowledging that an employer has a right to take a given action and requiring that he bargain with the employees' collective bargaining representative *before* taking that action. In the latter case, the employer would still be free, were an impasse reached, to take the action contemplated. See *Brockway Motor Trucks*, *supra*, 230 N.L.R.B. at 1003 (Board mandates only the process of good faith bargaining, not any particular outcome of negotiation). By the same token, in holding in *Darlington* that an employer has a right to close part of his business for antiunion reasons if he does not do so for the purpose and with the effect of chilling union activity in other parts of his enterprise, the Court did not ineluctably assume that he may close it abruptly without first discussing the closure with the union.

However, there is a practical reason why it may not always be worthwhile to consider the applicability of Section 8(a)(5) to a plant closure in a case in which discriminatory motivation exists. If an employer is willing to take the drastic step of going out of business, either in whole or in part, simply to penalize the employees for joining a union, requiring the employer to discuss his unlawful motives with the union would rarely be useful; indeed, to

the extent that he gives expression to such motives, he simply intimidates any employees who hear the message.[24] Of course, where such an employer has not closed his entire operation, the purpose of Section 8(a)(3) of the Act—to keep employers from using their hiring and firing power to interfere with union organization (see H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1935))—can be served by undoing harm deliberately inflicted on employees in the remaining parts of his enterprise. Requiring the employer to reopen the operation in question, if feasible, or to give backpay to the discharged employees and reinstate them or place them on a preferential hiring list would be appropriate remedies in such circumstances to demonstrate to the remaining employees that they are free to exercise their rights under the Act.

On the other hand, the purpose of Section 8(a)(5)—to ensure that the union is recognized as the representative of the affected employees and permitted to negotiate on their behalf—can be effectuated by requiring bargaining where the partial closing decision rests on economic considerations.[25] In this situation, as we have demonstrated (pages 17-30, *supra*),

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[24] In *Darlington* the Court cautioned that nothing in its opinion "would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision." 380 U.S. at 274 n.20.

[25] As the court below noted (Pet. App. 11a n.6), the question whether Section 8(a)(5) would impose a duty to bargain with respect to an economic decision to close an entire business is not presented here. See also *Ozark Trailers, Inc., supra*, 161 N.L.R.B. at 564-565.

results beneficial to both labor and management may be achieved, and the fundamental purpose of the Act—the preservation of industrial peace—is furthered by requiring the employer to bargain with the employees' representative before taking any action that will cost them their jobs.

II. ON THE FACTS OF THIS CASE, THE BOARD PROPERLY CONCLUDED THAT PETITIONER WAS REQUIRED TO BARGAIN WITH THE UNION OVER ITS DECISION TO TERMINATE ITS GREENPARK OPERATION

The propriety of requiring bargaining over partial closing decisions is well illustrated by the facts of this case. The continued employment of the 35 employees whom petitioner supplied to Greenpark for a price composed of labor costs plus a management fee hinged on a "strictly dollars and cents" (A. 83) issue: whether petitioner could secure an increase in the profits of the operation by August 1. Greenpark could not afford to pay more, but, having earlier secured concessions from petitioner on both price and service, it was satisfied with the price it was then paying. In these circumstances, the only alternative to losing their jobs was for the employees to agree to cost-cutting measures that would enable petitioner to offer Greenpark a package that cost Greenpark no more but allowed petitioner to receive the benefit of the newly achieved economies. Thus, as the court of appeals noted in *Fibreboard*, it is realistic to think that the employees might agree "to increase productivity and reduce costs." [26] In-

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[26] *East Bay Union of Machinists, Local 1304* v. *NLRB*, 322 F.2d 411, 414 (D.C. Cir. 1963) (Burger, J.), aff'd *sub nom. Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).

deed, the court below found (Pet. App. 14a) sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would * * * have enabled Greenpark to give [petitioner] an increased management fee." It is neither possible nor necessary to determine whether bargaining would have resulted in a bargain satisfactory to both sides. *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 214. The critical point is that, contrary to petitioner's claims (Pet. Br. 24), whether or not its decision was formally predicated on labor costs, matters such as wages, benefits, work practices, and crew size were highly relevant to that decision. Where, as here, an employer has "frustrated collective bargaining with respect to these concededly bargaining issues * * *, it can properly be found to have violated its statutory duty under § 8(a)(5)." 379 U.S. at 225 (Stewart, J., concurring).

Furthermore, although "there might be circumstances which the Board could or should accept as excusing or justifying unilateral action" (*NLRB* v. *Katz*, 369 U.S. 736, 748 (1962)), no such circumstances are presented here. As demonstrated above, this is not a case "where the economic factors guiding the management decision to close * * * are so compelling that employee concessions cannot possibly alter the cost situation" (*Ozark Trailers, Inc.*, *supra*, 161 N.L.R.B. at 570).[27] Nor is this a case where, as a

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[27] Cf. *Brooks-Scanlon, Inc.*, *supra*, 246 N.L.R.B. No. 76, 102 L.R.R.M. at 1607 (shutdown of saw mill department "emanated solely from the insufficient supply of pine timber which existed in the immediate area"); *NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 195, 196 (3d Cir. 1965) ("no room for union negotiation" in circumstances

result of an emergency or some other compelling circumstance, there was no time for bargaining.[28] On the contrary, during the two-week period between July 12 (when the Union made a formal request for collective bargaining negotiations which petitioner thereafter ignored) and July 25 (when petitioner advised Greenpark that it would definitely terminate its services as of August 1), petitioner admittedly was engaged in discussions with Greenpark (A. 75), and there is no reason why it could not have had discussions with the Union as well.[29]

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where the employer's closing of a money-losing plant was precipitated by a final offer from local housing authority planning to redevelop the area); *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933, 935-937 (9th Cir. 1967) (no obligation to bargain where the employer's closing of the facility and relocation as minority partner in a new joint venture was prompted by the threat of being unable to serve adequately its principal customer); *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969) ("No amount of collective bargaining could erase the economic facts that gave rise to the Company's decision to close * * *."); *Int'l Ass'n of Machinists and Aerospace Workers* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 551, 557 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (the company "asserts without contradiction that this [merger] is its last chance for survival"; "[t]he economic necessity for a merger cannot be eliminated by bargaining * * *").

[28] Cf. *Raskin Packing Co., supra*, 246 N.L.R.B. No. 15, 102 L.R.R.M. at 1490-1492 (employer's ongoing line of bank credit was suddenly cancelled and immediate action by the employer was required); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) ("small" and "money-losing enterprise" suffered theft of two trucks, creating "overwhelming economic need for shutting down then and there").

[29] Petitioner's continued reliance (Pet. Br. 25) on the fact that Greenpark refused the Union's July 28 request that it waive its right to a 30-day termination notice overlooks the

Finally, nothing in the record suggests that bargaining with the Union would have significantly interfered with petitioner's right to manage its business. Although a third party—Greenpark—was involved, petitioner does not claim, and the record does not show, that its refusal to bargain was justified because of a legitimate need for secrecy in negotiations with any third party,[30], or an obligation to preserve a third party's confidences.[31] Nor, as shown, is this a case where the employer's decision was predicated exclusively on financial or entrepreneurial considerations that could not be influenced by bargaining.[32] Petitioner was not going completely out

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fact that there was ample opportunity to bargain about the decision earlier, if only petitioner had responded to the Union's July 12 request.

[30] Cf. *General Motors Corp., supra*, 191 N.L.R.B. at 952 (decisions to sell part of a business "ofttimes require secrecy as well as the freedom to act quickly and decisively").

[31] Cf. *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979) (confidentiality interest justified employer's qualified refusal to supply collective bargaining representative with requested information).

[32] Cf. *National Car Rental System, Inc.*, 252 N.L.R.B. No. 27, ALJD slip op. 14-15, 105 L.R.R.M. 1263, 1268 (Sept. 16, 1980) (closing of terminal and sale of accounts, in response to competitor's unsolicited offer to buy, was based on matters "essentially financial and managerial in nature" involving the "scope and ultimate direction of an enterprise"); *NLRB* v. *Burns Internat'l Detective Agency, Inc.*, 346 F.2d 897, 899-902 (8th Cir. 1965) (no obligation to bargain concerning decision to cancel a contract and close out a division following the loss of all other contracts in the metropolitan area and unsuccessful attempts to secure additional business, in circumstances where the employer could not continue to service the one remaining customer without incurring a substantial financial loss).

of business,[33] or even terminating a distinct line of business.[34] On the contrary, petitioner was continuously engaged in providing cleaning and maintenance services for various commercial customers (A. 24-25, 31), and, as the administrative law judge found (Pet. App. 33a), the record does not show that the termination of the contract—which involved no capital—either altered the nature of petitioner's business or substantially affected its total size.[35] Even after the closing was announced, petitioner was will-

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[33] Cf. *Merryweather Optical Co.*, 240 N.L.R.B. 1213, 1214-1215 & n.1 (1979). See also *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971, 978, 988, enforced on other grounds *sub nom. NLRB* v. *Armato*, 199 F.2d 800 (7th Cir. 1952), discussed by petitioner (Pet. Br. 14 n.13).

[34] Cf. *Summit Tooling Co., supra*, 195 N.L.R.B. at 480; *NLRB* v. *Drapery Mfg. Co.*, 425 F.2d 1026 (8th Cir. 1970).

[35] At the hearing petitioner did not attempt to establish that the cancellation of the Greenpark job substantially reduced its size or altered its basic operation. The evidence upon which petitioner now relies for this proposition (Pet. Br. 25)—namely, the "guess" of its co-owner that "between two to four" other nursing homes were serviced during this period (A. 84)—was not introduced for the purpose of establishing petitioner's size. Rather, it was a preliminary inquiry preparatory to petitioner's counsel's reexamination of the co-owner on the question of whether there was any interchange among petitioner's nursing home work crews (A. 84-85; see also A. 63-64). This inquiry appears to have been related to the fact that petitioner had refused to offer transfers to the Greenpark employees (A. 109), and the General Counsel was desirous of pursuing matters that might indicate discriminatory motivation (Tr. 15-16; A. 58). The administrative law judge found that the co-owner's "guess" as to the number of nursing homes serviced was either evasive or an indication that petitioner's "overall operations are so extensive the secretary-treasurer cannot keep in mind how many are of a particular type" (Pet. App. 29a), and he inferred the latter (Pet. App. 30a, 32a).

ing to continue at Greenpark if the Union could work out satisfactory arrangements, but, by withholding notice of its decision, it left the Union with no time to do so.

In sum, balancing the interests of the employer and the employees in light of the policy of the Act to promote the peaceful settlement of industrial disputes through collective bargaining, the Board could reasonably find that petitioner's failure to give the employees' representative notice and opportunity to bargain about its decision to discontinue the Greenpark operation and terminate the employees violated Section 8(a)(5) of the Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals enforcing the Board's order should be affirmed.

Respectfully submitted.

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